

TRANSCRIPT OF PROCEEDINGS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF:

EB DOCKET NO. 04-381

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.

FCC-04LJ RCD
DEC 23 1 04 PM '04

04-381-1

DATE OF HEARING: DECEMBER 13, 2004

VOLUME: 1

PLACE OF HEARING: WASHINGTON, D.C.

PAGES: 1-105

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Opening StatementsPage

Complainant 15
By Mr. Siever

Exhibits

None.

Start Time: 9:34 a.m.
End Time: 11:19 a.m.

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P-R-O-C-E-E-D-I-N-G-S

9:34 a.m.

CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.

We're on the record. This is our first pre-hearing conference in Florida Cable Telecommunications versus Gulf Power Company, EB Docket 04-381. I'm going to, if you bear with me, I'm going to go through the formality of asking counsel first to introduce themselves. I should say good morning first because obviously, I'm trying to do the best I can to place names and faces, but just bear with me.

On behalf of -- let me start with the bureau. On behalf of the bureau?

MR. JAMES SHOOK: James Shook.

MS. LISA GRIFFIN: Lisa Griffin.

MS. RHONDA LIEN: Rhonda Lien.

MR. SHOOK: Your Honor, we have a fourth person there.

MR. JOHN W. BERRESFORD: Your Honor, I am John W. Berresford and I would like to enter an appearance herein on behalf of the bureau.

CHIEF ADMINISTRATIVE JUDGE SIPPEL: Are

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1 you a bureau -- are you a Commission employee?

2 MR. BERRESFORD: Yes, I am.

3 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.

4 Let me have your name again, please?

5 MR. BERRESFORD: John W. Berresford, B-E-
6 R-R-E-S-F-O-R-D.

7 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.

8 Okay, Mr. Berresford. You're welcome to be here.

9 MR. BERRESFORD: Thank you.

10 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I'm
11 going with the case caption now on behalf of the -- I
12 don't know. I'm going to refer to these sometimes as
13 the cable companies or the complainants.

14 MR. JOHN SEIVER: Yes, John Seiver, Your
15 Honor.

16 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Mr.
17 Seiver, good morning.

18 MR. BRIAN JOSEPH: Brian Joseph.

19 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Mr.

20 Joseph, good morning.

21 MR. COOK: Good morning.

22 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Good

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1 morning, Mr. Cook. On behalf of Gulf Power?

2 MR. ERIC LANGLEY: Eric Langley, Your
3 Honor.

4 MR. RALPH PETERSON: Ralph Peterson.

5 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Good
6 morning.

7 MR. PETERSON: Good morning.

8 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.
9 Let me just start just very briefly, I think this is
10 unnecessary, but I'm going to say it. There is a
11 little bit of courtroom deportment and that would be -
12 - excuse me. I'm adverse to coffee drinking or food
13 in the courtroom but certainly, you can bring bottled
14 water in, because I can't vouch for the quality of the
15 water otherwise, but feel free. Now, I received from
16 each party - each of the private parties, not the
17 bureau, I didn't ask it and I didn't get it from the
18 bureau, and that is the preliminary statements on the
19 alternative costs methodology. They're helpful to me
20 but the purpose of those submissions were to try and
21 get myself focused on where your thinking is.

22 These are not dispositive documents. I

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1 know they weren't intended to be and that's why I made
2 the point that they'd be preliminary. These issues
3 that are being discussed in these papers are not going
4 to be resolved at least, certainly at this stage, by
5 summary decision or anything. So no matter how
6 persuasive you may try to couch your arguments in
7 terms of the validity, the value, the relevance of
8 your opposition's points, I'm not focused, I'm not
9 going in that direction.

10 I'm simply trying to understand, at this
11 point, where you are coming from in the context of
12 evidence because what I want to do here today is set
13 as tight a schedule as I can in terms of how we're
14 going to handle this evidence, how we're going to get
15 it in and how long is it going to take to be
16 developed. I have one footnote that I want to add to
17 that and then I'm recognizing that this case has been
18 in a different form of adjudication before the
19 enforcement bureau, I guess since, correct me if I'm
20 wrong, but at least for the last two years. There has
21 been a considerable exchange of information.

22 So, what does that tell me? That gives me

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1 a little bit of an opening, I think, to assume that
2 you have a pretty good idea with respect to what the
3 evidency of the other parties are, particularly with
4 respect to Gulf Power. Now, you may disabuse me of
5 any presumptions that I'm making in that regard before
6 we leave this morning. I am trying as best I can to
7 refine the evidence, to limit the evidence, and to
8 keep everybody's eye on the ball and not be getting
9 into a lot of motions with respect to you're not
10 getting information you need or you're asking for
11 information.

12 Relevance, relevance, relevance -- I have
13 a very broad philosophy with respect to discovery
14 relevance. So if you have a motion on a point of
15 discovery, documentary discovery, outside the area of
16 privilege, I'm not going to be particularly happy when
17 I receive them because you should be able to, at this
18 stage of the game, it seems to me, you should be able
19 to work that out. Now, you all know better than I do,
20 but I'm looking at this from the standpoint of Gulf
21 Power has been assigned the burden of proof, the
22 burden of proceeding. I acknowledge from the

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1 preliminary statement that that's not how this case
2 started out. I have no comment with respect to how
3 the hearing designation order framed that issue, but
4 it's there. It's a plain clear issue and it gives me
5 the guidance that I need to give you the guidance that
6 I think you need. That is where my focus is this
7 morning, that is, on the party that's got the burden
8 of proof.

9 The cable companies are going to have the
10 opportunity to get that proof or see that proof, to
11 depose on that proof within -- that's not an open
12 invitation, but within where needed to certainly fully
13 depose and to fully get all that information. So with
14 respect to what Gulf Power will be seeking discovery
15 of the cable companies is concerned, I'd like to hear
16 an explanation of that, because I don't know what you
17 need at this stage of the game. Now, if we get into
18 rebuttal testimony, there are experts who are going to
19 come in to rebut yours; of course you're going to get
20 the discovery that you need. They're not in the
21 posture of claiming anything at this point in terms of
22 how this case is structured. Although there was a

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1 point in time when they were claiming. They were the
2 proponent, if you will, of the issue.

3 Now, I'm moving around on a lot of things.
4 We're going to get back to very specifics but I'm
5 trying to cover things that are in the front of my
6 mind as far as gathering an understanding of where
7 were are. That is there is a pending motion for
8 reconsideration, am I correct on that? I think it's
9 a Gulf Power Motion.

10 MR. PETERSON: Your Honor, there is a
11 petition for reconsideration of a Commission's
12 decision but at the same time requested this
13 evidentiary hearing. It was a two-part motion and the
14 Commission resolved it by essentially granting the
15 request for an evidentiary hearing. So I think, my
16 understanding is, that the Commission was intending to
17 defer ruling on the petition for reconsideration until
18 after the resolution of this hearing proceeding.

19 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.

20 MR. SEIVER: Your Honor, I was going to
21 suggest that I think it would be up to the bureau,
22 Your Honor. I do believe that the rehearing is -- or

1 the reconsideration is still pending, but we had a
2 question about how that was going to be resolved,
3 whether that was for Your Honor to resolve or if
4 there's a recommendation and then the bureau resolves
5 it. I didn't know how that process was going to work.

6 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
7 maybe we can get an explanation. My concern is not so
8 much that I would be -- you'd have to get me kicking
9 and dragging into participating in that particular
10 procedure, but however, if a ruling is going to come
11 down in the middle of this case that's going to impact
12 particularly on anything in evidentiary that I'm
13 wrestling with, I'd like to know about that. That is
14 my major concern.

15 MS. GRIFFIN: Your Honor, there is nothing
16 that the Enforcement Bureau has closed out this matter
17 from its books. We've ruled on a petition for
18 reconsideration pursuant to the Commission rule that
19 says that the agency may grant or deny the motion or
20 order such further proceedings, as it deems necessary.
21 In light of Gulf Power's motion for an evidentiary
22 hearing, we deemed it necessary - the bureau deemed it

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1 necessary to have this proceeding before the ALJ. So
2 there's nothing pending presently before us. The
3 Bureau rejected the other - certain other grounds that
4 were contained in the motion for the consideration and
5 a couple of footnotes in the hearing designation
6 order. As far as we're concerned there is nothing
7 further open before us. The issue that is presented
8 here to determine whether Gulf Power is entitled to
9 receive compensation and excessive marginal cost and
10 the amount of that compensation are issues to be
11 decided here at the hearing stage.

12 CHIEF ADMINISTRATIVE JUDGE SIPPEL: All
13 right. I hear that pretty loudly. That's loud and
14 clear. I guess you are speaking on behalf of the
15 Commission too; I mean this thing isn't pending
16 someplace else?

17 MS. GRIFFIN: No, it's here. Nothing else
18 will be coming down from us.

19 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Thank
20 you. Thank you. That should make all of us sleep
21 better.

22 MR. SEIVER: Your Honor, I'd just hate to

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1 interrupt. If I could just get for clarification from
2 Ms. Griffin, I understand that in the ordering
3 clauses, footnote 21 says, we express no opinion about
4 the ultimate merits of the petition whether Gulf Power
5 is entitled to receive compensation leaving that to
6 the ALJ. So I was just trying to understand, as a
7 procedural matter, that the petition is not fully
8 resolved until after this court makes a - this is from
9 the HDO, paragraph 21 on page four.

10 MS. GRIFFIN: Right, that is correct. I
11 mean this - the remaining issues that will fully
12 resolve the issue are pending here but there's nothing
13 further that the Bureau is going to do or the
14 Commission is going to do. We're going to await
15 decision by Judge Sippel on the issue that we're
16 designating.

17 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I
18 think that's clear enough. Whatever - I'm not going
19 to even try and paraphrase any of that. The record is
20 perfectly clear. Okay. Now, having said my piece,
21 I'd invite counsel, and I'm going to start with Gulf
22 Power, in terms of how - do you want to make any kind

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1 of an opening, a preliminary statement. Did you come
2 into court with that in mind?

3 MR. LANGLEY: Your Honor, I did not. If
4 you would like us to.

5 CHIEF ADMINISTRATIVE JUDGE SIPPEL: No,
6 that's okay.

7 MR. SEIVER: I did, Your Honor.

8 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I just
9 want to get things clear as best I can in my mind
10 before I start in. We're here to work this morning.
11 Go ahead, sir.

12 MR. SEIVER: Thank you, Your Honor. As
13 Your Honor observed the proceedings have been going on
14 for some time and it began with the Cable Associations
15 complaint that the rates that were being charged by
16 Gulf Power for the pole attachments were unjust and
17 unreasonable.

18 After those were resolved, or during the
19 course of them being resolved, there was an
20 intermediate set of appeals in the Alabama Power case,
21 which is a - Alabama Power is a sister company to Gulf
22 Power and I believe represented by the same counsel,

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1 where the constitutional just compensation argument
2 was made. There was a different one that had been
3 made some 20 years ago.

4 Originally, the formula was challenged as
5 being an unconstitutional taking because when cable
6 operators were on the poles and occupied space, it was
7 a cost based formula, even though there was make-ready
8 and there was some profit built in.

9 Florida Power said, no, this is a taking
10 and the formula is not just compensation. The Supreme
11 Court rejected it and then a footnote said, well, it's
12 a little bit different because here you have a
13 voluntary contractual relationship with the cable
14 operators whereas if it were a forced contractual
15 relationship, we might look at it differently.

16 In the '96 act, that changed where even
17 though we've been on the pole for all these 20 some
18 years, there was a new provision put in that said that
19 the utilities, investor owned utilities, would have to
20 grant access to cable operators or to
21 telecommunications carriers. Alabama Power said,
22 well, all right, that's the other shoe now has

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1 dropped. By the way, we're terminating your
2 attachments and if you want to stay on the poles, you
3 have to exercise your mandatory access rights. The
4 reason that was done is so that they could have a
5 constitutional challenge to the rate. Now they were
6 saying, well, we were forced to let them stay on the
7 pole so that means we're entitled to just
8 compensation. The FCC formula is not just
9 compensation. They sued in district court, and I was
10 remembering that with Mr. Peterson, back in early '96.

11 It was determined that it was a taking.
12 That actually mandatory access under 224 was a taking
13 of the one-foot of space that's on the pole where the
14 cable operator's attachments are attached, the wires
15 are attached. However, it was determined that the
16 FCC's formula provided just compensation. The issue
17 of the FCC's formula which bleeds over into this
18 proceeding was a critical one because it was based on
19 cost recovery and a level of profit.

20 Under the FCC's formula, which has been
21 implemented in a number of states that have also
22 certified to regulate pole attachments instead of the

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1 FCC and the FCC's formula, which has been upheld and
2 opined on, allows utilities to recover the entire set
3 of incremental or marginal costs of allowing an
4 attachment. When there's a pole and a cable operator
5 is not on that pole and says, I want to go onto a
6 pole, there is a process where there's a permit done
7 and an estimate of make-ready so that if the pole
8 needs to be - if there has to be a hole drilled and a
9 bolt put through and a clamp so that the strand can go
10 on and then the wire, that that is paid for by the
11 cable operator even though it would be the utility
12 performing that work.

13 There's also a pole change out if in fact
14 you want to go onto a pole and its insufficient
15 clearance because the lowest wire is at, let's say, 15
16 feet or 19 feet, whatever it happens to be for the
17 area where it is, and the utility says, well, we're
18 happy to let you go on but like our pole attachment
19 agreement says, we've got to put in a taller pole.

20 So we write a check for, maybe it's
21 \$5,000, \$7,000. A whole new pole is put in, all the
22 wires are switched from the shorter pole to the taller

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1 pole and on we go. Then we can build down whatever
2 the street or the area is that we need to put our
3 wiring up to service our customers. These change outs
4 are part of the make-ready. The costs of having that
5 all performed are part of the make-ready. After make-
6 ready is done and the cable operators attach, there's
7 another payment that the cable operators and also
8 telecommunication carriers make to the utility, which
9 is rent. The rent is performed under a formula that
10 was guided by 224(d) that allows for all of the
11 existing costs of the pole plant. You get to the net
12 bare cost of the pole, what that pole costs, and you
13 allocate maintenance expenses, carrying charges, even
14 a level of profit and you go through the formula and
15 you use specific accounts that the utilities maintain.
16 I believe they are in the FERC statement of accounts.
17 Numbers are crunched and you come up with an annual
18 pole rental.

19 Now, sometimes we can look at this as
20 paying twice. If we had to pay for a change out of a
21 pole, we also end up paying that part of the new pole
22 investment account and we actually pay rent. So, we

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1 buy the pole and then we pay rent to be on that pole
2 that we bought for them. It's upgraded their service
3 and if we put in a two and half foot taller pole, for
4 example, that goes from 37 ½ feet to 40 feet, there
5 generally will be another foot and a half of space
6 that then utility can rent out, which we don't get any
7 part of, to other people that might come along.

8 Now if we're on the pole and we're happy
9 and a new carrier, a new cable operator, a new
10 telecommunications --

11 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I'm
12 sorry to interrupt. You said if you're happy. I'm
13 understanding from what you're telling me thus far
14 that all this is being done in conjunction with the
15 Commission rule on --

16 MR. SEIVER: Correct, Your Honor.

17 CHIEF ADMINISTRATIVE JUDGE SIPPEL: So, I
18 mean, there is really not something that you would
19 negotiate it to get to where you are. You've gotten
20 there because the rules so provide for all of that.

21 MR. SEIVER: You are right, Your Honor.
22 The pole agreements - we have a very extensive pole

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1 agreement, but it is informed by the Commission's
2 rules because if they put in a provision that we did
3 not like, that did not provide consistent with the
4 Commission rules, then we would file a complaint and
5 the Commission would reform it. So we have the
6 regulatory position of the Commission and its
7 interpretation over these 26 years since the '78 pole
8 act to help inform our negotiations when we do a pole
9 agreement. That's how we've gotten to this point.

10 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.
11 Please proceed.

12 MR. SEIVER: Thank you. We were already
13 on a pole and a third party, whoever it might be, a
14 telecom carrier or a cable operator, comes along and
15 says, well, we want to get on that same pole, and Gulf
16 Power says, well, you know what, there's no space.
17 We're already at the - the telephone company is on the
18 bottom and with the traffic that we have there we have
19 to be on at a certain clearance and we've got a
20 transformer. Maybe these 18 poles over here are fine
21 but this one right here we've got a transformer and a
22 street light, we've got to put in a taller pole.

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1 So out goes the make-ready for the new
2 carrier. Under the Commission's rule, under the
3 statute as well, it says, if you're an existing
4 attacher, you get the chance to modify your attachment
5 when they put in a new pole, but they can't charge us,
6 the existing attachers, for the replacement of a new
7 pole and the cost of getting that new pole ready for
8 this additional attacher. So, what would happen, we'd
9 get notice and, sure enough, the new pole goes in that
10 the new carrier pays for and everybody comes out and
11 does their rearrangement and we'll go on about our
12 way. We're happy. We've had not interruption in
13 service. Our attachment is still there and now
14 there's a bigger pole that somebody else has to pay
15 for.

16 We've had this relationship and it's been
17 guarded by Commission precedent for years. It's been
18 - we don't always get along. Power companies would
19 obviously like more money. We sometimes get upset
20 when we get penalized. For example, we're supposed to
21 get a permit every time we do an attachment. If we
22 want to modify an attachment, we have to do another

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1 permit. We're over lashing. They didn't like the
2 idea that we would over lash to our existing
3 attachment without notice or without a permit. That's
4 all been litigated and determined in some of the
5 Southern Company cases, both in the DC circuit and in
6 the 11th circuit. Whatever it has been we've always
7 had the 224 and the Commission's interpretations to
8 guide us.

9 Now the '96 act did change that by having
10 the requirement that they leased to us. Even though
11 I'm not aware, except in one instance back in the
12 '70s, that a utility actually denied access to someone
13 that wanted to attach. That's because under the law,
14 as we've argued it, even though I know Gulf Power will
15 contest it and not concede it, the poles are an
16 essential facility. The whole problem that generated
17 the 1978 act was that the utilities had this essential
18 facility, a monopoly set of poles, and were charging
19 monopoly rent. Instead of permitting that, Congress
20 said, no, we're going to have the Commission regulate
21 those rents and make sure that cable operators can
22 attach. We're not going to take property from the

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1 utilities. They're going to get their reasonable
2 profit. They're going to get all their costs.

3 That's how we came up with this cable
4 formula, which at the bottom end would be incremental
5 costs and at the top end has all the fully allocated
6 costs, carrying charges, maintenance, in addition to
7 the make-ready that we pay. Generally, the Commission
8 would admit this, because we've done it. They always
9 set the rent at the top end of the scale. That's
10 where it's always been, not at the bottom end which is
11 just the incremental cost of allowing an attachment.
12 Well, we've had this dispute about what the rate
13 should be and whether or not it should go higher
14 because now they have to let us stay on the pole even
15 though they've never really kicked us off. They said
16 they terminated our agreements but nobody has ever
17 been removed from the pole.

18 We still have a monopoly facility where
19 there's not really a market for pole space. If other
20 people could come in and set poles and you could have
21 three, four, I don't know, five sets of poles going
22 down a street, the local governments would go insane

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1 and then they would not allow that. In fact, we don't
2 have the authority to condemn land to put up poles.
3 That's something that generally the telephone company
4 or the electric utilities have. So, we don't have a
5 free market for pole space. If a utility knows that,
6 well, we've got this and nobody else can duplicate it,
7 they can charge whatever they want. If we really
8 wanted to serve our customers, it wouldn't have to be
9 a cost based rate. It could be whatever the market
10 would bear, which would mean anything they wanted to
11 charge.

12 So that's why we've had a problem with the
13 change and approach of going from a formula based,
14 cost based compensation for attachments to some sort
15 of a market value base and why we have opposed it, why
16 the Commission and the APCO review order rejected it
17 and why we look at the Supreme Court precedent that
18 we've mentioned in our alternate statement. Statement
19 on the alternate cost methodology has never been
20 accepted in a just compensation case. If you've got
21 a monopoly product or any product that's being taken,
22 you don't look at what you could have gotten in a free

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